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PREACHING, FUNDRAISING AND THE CONSTITUTION: ON PROSELYTIZING AND THE FIRST AMENDMENT

MARK STRASSER[†]

INTRODUCTION

In a series of cases in the late 1930s and early 1940s, the United States Supreme Court recognized that proselytizing, even when including attempts to raise money, is a paradigmatic example of religious activity and is constitutionally protected when performed by private actors. The Court recently reaffirmed that approach in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*.¹ Yet, the Court's attitudes towards proselytizing and religious fundraising become much more difficult to discern when one also considers cases involving the International Society for Krishna Consciousness (ISKCON).

Members of the Court have implied that the apparent inconsistency in the jurisprudence can readily be explained if one considers the differing roles played by the government in these cases. However, that is false. The jurisprudence is much more confused in this area than the Court or commentators would have one believe, even if one factors in the government's varying roles in these cases. The Court is of at least two minds both with respect to whether religious speech should simply be treated as any other form of protected speech and with respect to whether fundraising for religion is afforded robust constitutional protection.

Part I of this Article discusses the door-to-door solicitation line of cases, noting the robust protections which the Court implies are constitutionally guaranteed. Part II discusses the major opinions involving ISKCON, in which the Court differentiates between proselytizing and religious fundraising, suggesting that the former must be protected while upholding the government's policies limiting or prohibiting the latter. This part explores some of the possible explanations for this apparent differential treatment, explaining why these rationales cannot account for this apparent inconsistency. The Article concludes that this differential treatment can be explained, at least in part, by the Court's own ambivalence with respect to whether religious speech and practice must be treated differently than other kinds of speech and practices, and with respect to whether religious fundraising should indeed be treated as religious speech.

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1. *Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002).

I. WITNESSES AND THE CONSTITUTION

In a series of cases beginning about seventy years ago, the Court made clear that proselytizing—attempting to convert individuals from one religious belief to another,² which may but need not include fundraising³—is protected constitutional activity when performed by private actors.⁴ Sometimes, the Court treats private proselytizing as a subset of the general category of private speech afforded First Amendment protection.⁵ At other times, however, members of the Court suggest that it has special protection precisely because it involves religious expression. The Court's ambivalence about this issue is suggested but rarely discussed explicitly in many of its opinions, perhaps because this line of cases can arguably be explained in terms of speech considerations alone. Thus, one cannot tell in this line of cases whether the fact that *religious* proselytizing is at issue plays any role in the constitutional analysis, although members of the Court consistently hint that it does.

A. Proselytizing and the State

One of the seminal proselytizing cases is *Lovell v. City of Griffin*,⁶ in which Alma Lovell was convicted of distributing literature without a permit.⁷ She did not deny that she had committed the action alleged,⁸ but instead claimed that the ordinance was unconstitutional because it

2. See *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 n.10 (10th Cir. 1998).

3. Cf. Howard O. Hunter & Polly J. Price, *Regulation of Religious Proselytism in the United States*, 2001 BYU L. REV. 537, 538-39 (2001) ("We use the term 'proselytism' here to include speech and associated conduct involved in spreading the word of God and persuading others to convert or to follow the message delivered by the person or group of persons engaged in proselytism The focus is on preaching, soliciting, canvassing, distributing tracts, and other methods of persuasion and teaching about one's religion.").

4. David M. Smolin, *Exporting the First Amendment?: Evangelism, Proselytism, and the International Religious Freedom Act*, 31 CUMB. L. REV. 685, 686 (2000-2001) ("[T]he question of restricting evangelism/proselytism is a 'no-brainer' within the American context, at least so long as such activities are not conducted in public schools or by governmental officials operating in their official capacities. Few question the right of private citizens to engage in speech designed to persuade others to adopt a certain religion, and even fewer would limit the right to change one's religion.") (footnote omitted); Richard W. Garnett, *Changing Minds: Proselytism, Freedom, and the First Amendment*, 2 U. ST. THOMAS L.J. 453, 457 (2005) ("[T]he [First] Amendment is well understood as protecting and celebrating not just expression but persuasion—or, if you like, proselytism.").

5. Hunter & Price, *supra* note 3, at 539 ("Courts in the United States have treated proselytism as a form of free speech within the coverage of the First Amendment to the United States Constitution.").

6. 303 U.S. 444 (1938).

7. *Id.* at 447. The ordinance at issue said

[t]hat the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind, whether said articles are being delivered free, or whether same are being sold, within the limits of the City of Griffin, without first obtaining written permission from the City Manager of the City of Griffin, such practice shall be deemed a nuisance, and punishable as an offense against the City of Griffin.

Id.

8. See *id.* at 448.

abridged the freedom of the press and her right to the free exercise of her religion.⁹

When analyzing the implicated constitutional guarantees, the *Lovell* Court noted that “[f]reedom of speech and freedom of the press . . . are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.”¹⁰ After noting that the prevention of prior restraint was “a leading purpose in the adoption of the constitutional provision”¹¹ and suggesting that the ordinance’s “character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship,”¹² the Court struck down the statute.¹³ The Court expressed special concern about the breadth of the ordinance, which prohibited the “distribution of literature of any kind at any time, at any place, and in any manner.”¹⁴ Perhaps equally worrisome was that the ordinance required those seeking to distribute literature to obtain a permit from the City Manager¹⁵ without any specification concerning the criteria to be used by that manager when deciding whether to issue a permit.¹⁶ In striking down the ordinance based on these concerns, the Court sounded themes which are commonplace in First Amendment cases—the importance of assuring that ordinances targeting speech are not overbroad¹⁷ and the importance of not giving officials unfettered discretion with respect to which kinds of speech will be permitted.¹⁸

Almost as an afterthought, the Court indirectly noted that permit requirements can impose special burdens on certain religious groups. In explaining why *Lovell* had never even applied for a permit, the Court noted that “she regarded herself as sent ‘by Jehovah to do His work’ and that such an application would have been ‘an act of disobedience to His

9. *Id.*

10. *Id.* at 450.

11. *Id.* at 451-52.

12. *See id.* at 451.

13. *See id.*

14. *Id.*

15. *Id.*

16. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 537-538 (1981) (“According to such wide discretion to city officials to control the free exercise of First Amendment rights is precisely what has consistently troubled this Court in a long line of cases starting with *Lovell v. Griffin*, 303 U.S. 444, 451 (1938).”); *see also Kunz v. New York*, 340 U.S. 290, 293-94 (1951) (striking down an ordinance giving the police commissioner unlimited discretion with respect to whether a permit would be issued for a meeting for public worship).

17. Indeed, limiting the breadth of statutes and their possible chilling effects are thought to be so important that statutes may be struck down even if the individual challenging the statute engaged in unprotected speech. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 237 (2002) (“[O]verbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.”).

18. *Cf. Schall v. Martin*, 467 U.S. 253, 306-307 (1984) (“A principle underlying many of our prior decisions in various doctrinal settings is that government *officials* may not be accorded *unfettered* discretion in making decisions that impinge upon fundamental rights.”) (emphasis added).

commandment."¹⁹ Thus, in Lovell's view, the very act of asking a civil authority for permission to do God's work would be a violation of conscience.²⁰

While implicitly admitting that permit requirements might interfere with religious exercise, the *Lovell* Court did not address the constitutionality of requiring individuals to seek permits before they would be allowed to engage in religiously inspired activity.²¹ That issue was addressed in *Cantwell v. Connecticut*.²²

B. State Licensing

At issue in *Cantwell* was a statute requiring individuals to obtain a certificate before they could solicit funds in support of their religion.²³ The Court suggested that it was permissible to regulate solicitation to protect the public against fraud, even if such regulation might also affect efforts to solicit funds for religious causes.²⁴ The defect in the Connecticut statute was that it permitted the secretary of public welfare to determine which causes were religious in nature, which would determine whether the solicitation would be permitted.²⁵

19. *Lovell*, 303 U.S. at 448.

20. See Hunter & Price, *supra* note 3, at 541 ("The ordinance required that anyone who sought to distribute 'circulars, handbooks, advertising, or literature of any kind' first had to obtain a permit from the city manager. Lovell did not do so for religious reasons. She was called by God to spread the word and she needed no permit from a secular authority. Indeed, in her religion's view, to seek a permit would have been an insult to God.").

21. The Court was able to sidestep this issue because the ordinance was void on its face. See *Lovell*, 303 U.S. at 452-53 ("As the ordinance is void on its face, it was not necessary for appellant to seek a permit under it. She was entitled to contest its validity in answer to the charge against her.").

So, too, *Cox v. New Hampshire*, 312 U.S. 569 (1941), did not settle whether free exercise rights are implicated by a statute requiring individuals to get a permit before proselytizing, notwithstanding that the case involved Jehovah's Witnesses who had been prosecuted for and convicted of failing to get a permit before engaging in expressive activity. See *id.* at 570-71; see also Hunter & Price, *supra* note 3, at 542-43 (noting that in *Cox*, the "Witnesses had refused to seek a permit for the same reason as Alma Lovell—they were following God's mandate to spread the word and they needed no human permission to do so").

The sole charge against the appellants in *Cox* had been that they had engaged in a parade without a permit. See *Cox*, 312 U.S. at 573. As the *Cox* Court made clear, "[t]hey were not prosecuted for distributing leaflets, or for conveying information by placards or otherwise, or . . . for maintaining or expressing religious beliefs." *Id.* Thus, the Court was not even forced to discuss whether requiring a permit was itself an undue infringement of religious rights.

22. 310 U.S. 296 (1940).

23. See *id.* at 304 ("If a certificate is procured, solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited.").

24. *Id.* at 305 ("The general regulation, in the public interest, of solicitation . . . is not open to any constitutional objection, even though the collection be for a religious purpose.").

25. *Id.* ("[T]he Act requires an application to the secretary of the public welfare council of the State; . . . he is empowered to determine whether the cause is a religious one, and . . . the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth."); see also *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939) ("Conceding that fraudulent appeals may be made in the name of charity and religion, we

One of the issues addressed by the *Cantwell* Court was whether Cantwell, a Jehovah's Witness,²⁶ had been guilty of inciting violence.²⁷ The Court explained that when Cantwell's Catholic listeners²⁸ grew angry after Cantwell had played a phonograph record attacking the Catholic Church, they had asked him to leave and he had complied with their request.²⁹ The Court concluded that his conduct did not constitute a breach of the peace.³⁰

Part of the reason that his conduct did not constitute a breach involved the specific contents of the speech. While understanding that "the contents of the record not unnaturally aroused animosity,"³¹ the Court distinguished what Cantwell had said and played from "provocative language which . . . consisted of profane, indecent, or abusive remarks directed to the person of the hearer."³² The former, but not the latter, is "communication of information or opinion safeguarded by the Constitution."³³ Although the *Cantwell* Court could have concluded its analysis after noting that the speech was not profane, indecent, or abusive, it did not, instead suggesting that Cantwell's speech had to be given more leeway by the state.³⁴

Cantwell is important for a few reasons. It suggests that the state will not be allowed to decide which sets of beliefs qualify as religious

hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.").

26. *Cantwell*, 310 U.S. at 300 ("Newton Cantwell and his two sons, Jesse and Russell, members of a group known as Jehovah's witnesses, and claiming to be ordained ministers, were arrested in New Haven, Connecticut, and each was charged by information in five counts, with statutory and common law offenses.").

27. *Id.* at 309 ("Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace.").

28. *See id.* at 303.

29. *Id.* ("On being told to be on his way he left their presence.").

30. *Id.* at 309.

31. *Id.* at 311.

32. *Id.* at 309.

33. *Id.* at 310.

34. *Id.* ("In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.").

Cf. Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, 1999 BYU L. REV. 251, 292 ("[P]roselytism can include criticism of the religious beliefs of a target; the unsuccessful attempt to change those beliefs is thus likely to cause injury to religious feelings. When states seek to curtail such injury by limiting proselytism, these restrictions must be carefully structured.").

and thus might be worthy of support,³⁵ and also that soliciting on behalf of a religion is itself protected, since that may be the only way that the religion can survive.³⁶ The decision further suggests that proselytizing is protected,³⁷ since *Cantwell* had been playing a record very critical of Catholicism in a neighborhood whose population was 90 percent Catholic.³⁸

When suggesting that the state could require individuals to get a permit before proselytizing, the *Cantwell* Court was not thereby validating any licensing system, e.g., even one which required individuals to pay fees before they could proselytize. At issue in *Murdock v. Pennsylvania*³⁹ was an ordinance requiring that individuals selling merchandise within the city of Jeannette buy a license from the borough treasurer.⁴⁰ Petitioners challenging the law were Jehovah's Witnesses,⁴¹ who went door to door distributing literature and asking people to buy religious books and pamphlets.⁴² None of the individuals selling the books had obtained a license.⁴³

One of the ways to analyze the implicated issues in *Murdock* is in terms of whether these transactions should be construed as sales. It was petitioners' "practice in making these solicitations to request a 'contribution' of twenty-five cents each for the books and five cents each for the pamphlets but to accept lesser sums or even to donate the volumes in case an interested person was without funds."⁴⁴ Arguably, one might treat a request for a contribution as something other than a sale, especially because the petitioners would sometimes give the materials away for free. However, the Court did not rely on the fact that petitioners were

35. *Cantwell*, 310 U.S. at 307 ("But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.")

36. *Id.* at 305 ("[T]he secretary of the public welfare council of the State . . . is empowered to determine whether the cause is a religious one He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.")

37. *Id.* at 302-03 ("Jesse Cantwell . . . stopped two men in the street, asked, and received, permission to play a phonograph record, and played the record 'Enemies,' which attacked the religion and church of the two men, who were Catholics.")

38. *Id.* at 301 ("On the day of their arrest the appellants were engaged in going singly from house to house on Cassius Street in New Haven. . . . Cassius Street is in a thickly populated neighborhood, where about ninety percent of the residents are Roman Catholics.")

39. 319 U.S. 105 (1943).

40. *Id.* at 106.

41. *See id.*

42. *Id.*

43. *Id.* at 107.

44. *Id.* Cf. *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 506 F. Supp. 147, 154 (N.D.N.Y. 1980) ("Whether or not the fair goer decides to purchase one of these items, the Krishna devotee will ask the fair goer to make a monetary donation. Even if the fair goer does not make a contribution, usually the Krishna devotee would permit the fair goer to keep the prasada or token, and sometimes even the more religious paraphernalia if it had been shown to the fair goer.")

merely asking for contributions or even that they would give the materials away for free on occasion. On the contrary, the Court characterized the transactions at issue as sales and then discussed the constitutionality of the Jeannette ordinance.

The Court began its analysis by admitting that it will sometimes be difficult to determine whether an activity is religious or “purely commercial,”⁴⁵ but suggested that such a distinction may be “vital,”⁴⁶ because it may make the difference between whether or not a practice can be precluded. For example, the Court suggested that the state is constitutionally permitted to prohibit the distribution of purely commercial leaflets on the streets but is not afforded similar leeway with respect to religious tracts.⁴⁷ The Court also made clear that the state cannot legally “prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion.”⁴⁸

Here, when suggesting that the Constitution precludes the state from prohibiting invitations to purchase books that will enhance religious understanding, the Court did not rely on the possible difference between selling something on the one hand and giving out something and then asking for a donation on the other.⁴⁹ Rather, the Court focused on the invitation to purchase written materials, i.e., an offer to sell them. The Court noted that “the mere fact that the religious literature is ‘sold’ by itinerant preachers rather than ‘donated’ does not transform evangelism into a commercial enterprise,”⁵⁰ reasoning that otherwise “the passing of the collection plate in church would make the church service a commercial project.”⁵¹

Yet, this justification is unpersuasive. When one offers a product for free and then asks for a donation, one is not tying the provision of the product to the receipt of dollars—on the contrary, the product has already been transferred and the receipt of a donation will not determine the product’s ownership. Indeed, where donations are anonymous (as might occur with the passing of a collection plate), the provision of the service/product to a particular person cannot depend upon whether that per-

45. *Murdock*, 319 U.S. at 110.

46. *Id.*

47. *Id.* at 110-11.

48. *Id.* at 111.

49. *Cf. id.* at 119 (Reed, J., dissenting) (“Petitioners suggest that their books and pamphlets are not sold but are given either without price or in appreciation of the recipient’s gift for the furtherance of the work of the witnesses. The pittance sought, as well as the practice of leaving books with poor people without cost, gives strength to this argument. In our judgment, however, the plan of national distribution by the Watch Tower Bible & Tract Society, with its wholesale prices of five or twenty cents per copy for books, delivered to the public by the witnesses at twenty-five cents per copy, justifies the characterization of the transaction as a sale by all the state courts.”).

50. *Id.* at 111.

51. *Id.*

son donated, since it simply will not be clear who donated (as long as there are some donations and those donations cannot be tied to a particular person, e.g., because they are in cash rather than by check).⁵² However, if the religious product is sold and, for example, either will not be transferred or will be taken back if the individual does not pay the requested amount, the process at issue is much closer to a standard sale.⁵³

Possible ways to distinguish notwithstanding, the *Murdock* Court made clear that seeking donations to support religion should be differentiated from mere commercial activities.⁵⁴ The Court noted that it is "plain that a religious organization needs funds to remain a going concern,"⁵⁵ and classified the practice of handing out religious tracts in exchange for donations as religious activity.⁵⁶ Indeed, the Court waxed eloquent when describing this activity:

The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses. It has been a potent force in various religious movements down through the years. . . . It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting.⁵⁷

The Court explained that the Constitution affords significant protection for this practice, pointing out that this "form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits."⁵⁸

The *Murdock* Court likened taxing these sales to the taxing of the exercise of other First Amendment freedoms and held the tax unconstitutional,⁵⁹ characterizing the ordinance as requiring "religious colporteurs

52. Cf. Calvin H. Johnson, *Was It Lost?: Personal Deductions Under Tax Reform*, 59 SMU L. REV. 689, 706 (2006) ("The preacher was paid by passing the collection plate and, at least in theory, contributions into the plate were voluntary. Payments into the collection plate are, thus, considered a loss without quid pro quo. One might protest that passing the hat works just as well to pay for the services as a ticket, pew rent, or other explicit one-to-one payment arrangement, but if the service is available for nothing, then the donation into the plate is considered a loss to the payor.").

53. Cf. Stahnke, *supra* note 34, at 263 (suggesting that some religious "activities could be described in a more commercial vein, such as selling or soliciting orders for books or other merchandise").

54. See also *Jamison v. Texas*, 318 U.S. 413, 417 (1943) ("The state can prohibit the use of the street for the distribution of purely commercial leaflets, even though such leaflets may have 'a civic appeal, or a moral platitude' appended. They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes." (citing *Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942))).

55. *Murdock*, 319 U.S. at 111.

56. See *id.* at 109.

57. *Id.* at 108-09.

58. *Id.* at 109.

59. *Id.* at 108 ("The First Amendment, which the Fourteenth makes applicable to the states, declares that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press' It could hardly be

to pay a license tax as a condition to the pursuit of their activities,"⁶⁰ and comparing the tax at issue to a tax on a preacher for the privilege of giving a sermon.⁶¹ This, the Court suggested, could not be done, even though it would be constitutional to "impose a tax on the income or property of a preacher."⁶² The *Murdock* Court alluded to a central concern articulated in *McCulloch v. Maryland*⁶³ by suggesting that were the constitutionality of the taxes at issue upheld, taxes might be imposed that would make it impossible for a particular religious practice to continue. The *Murdock* Court explained:

Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy.⁶⁴

Not only might such taxes impose a severe burden on relatively poor religious groups but such taxes might have particularly onerous implications for itinerant preachers, who might be taxed wherever they preached and might then find the taxes too burdensome to permit them to continue their preaching.⁶⁵ However, the Court made clear in *Follett v. Town of McCormick*⁶⁶ that the *Murdock* protections also applied to non-itinerant preachers.⁶⁷

C. Free Speech or Something More?

In *Martin v. City of Struthers*,⁶⁸ Thelma Martin challenged her conviction for distributing handbills at residences in violation of a local ordinance.⁶⁹ She pled that the ordinance violated the "right of freedom of

denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax imposed by this ordinance is in substance just that.").

60. *Id.* at 110.

61. *Id.* at 112.

62. *Id.*

63. 17 U.S. 316, 327 (1819) ("An unlimited power to tax involves, necessarily, a power to destroy . . .").

64. *Murdock*, 319 U.S. at 112; see also *Follett v. Town of McCormick*, 321 U.S. 573, 579 (1944) (Murphy, J., concurring) ("It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds.").

65. See *Murdock*, 319 U.S. at 115 ("Itinerant evangelists moving throughout a state or from state to state would feel immediately the cumulative effect of such ordinances as they become fashionable. . . . This method of disseminating religious beliefs can be crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town, village by village. The spread of religious ideas through personal visitations by the literature ministry of numerous religious groups would be stopped.").

66. 321 U.S. 573.

67. *Id.* at 577 ("A preacher has no less a claim to that privilege when he is not an itinerant.").

68. 319 U.S. 141 (1943).

69. *Id.* at 142. The ordinance read:

press and religion as guaranteed by the First and Fourteenth Amendments."⁷⁰ When striking down the ordinance,⁷¹ the *Martin* Court analyzed the issue before it as it might have analyzed any claim involving free speech, noting that the "authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance."⁷² However, Justice Murphy in his concurrence suggested that religious expression was entitled to special protection—"nothing enjoys a higher estate in our society than the right given by the First and Fourteenth Amendments freely to practice and proclaim one's religious convictions."⁷³ That protection was extended to expression which was "aggressive and disputatious as well as to the meek and acquiescent."⁷⁴

At issue in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*⁷⁵ was an ordinance requiring individuals to get permits from the mayor before going to residences to promote causes.⁷⁶ There was no charge for the permit,⁷⁷ and the permits would be issued routinely once the applicant had filled out a fairly detailed form.⁷⁸

The ordinance was challenged on its face and the Court examined its constitutionality "not only as it applies to religious proselytizing, but also to anonymous political speech and the distribution of handbills."⁷⁹ The petitioners, who had never applied for a permit⁸⁰ because they considered doing so as almost an insult to God,⁸¹ offered "religious literature

It is unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing.

Id.

70. *Id.*

71. *Id.* at 149 ("[W]e conclude that the ordinance is invalid because in conflict with the freedom of speech and press.").

72. *Id.* at 143.

73. *Id.* at 149 (Murphy, J., concurring); see also *Kunz v. New York*, 340 U.S. 290, 311 (1951) (Jackson, J., dissenting) ("The purpose of the Court is to enable those who feel a call to proselytize to do so by street meetings.").

74. *Martin*, 319 U.S. at 149 (Murphy, J., concurring).

75. *Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002).

76. *Id.* at 154 ("[A]ny canvasser who intends to go on private property to promote a cause must obtain a 'Solicitation Permit' from the office of the mayor.").

77. *Id.* ("[T]here is no charge for the permit.").

78. *Id.* at 154-55 (noting that the permit "is issued routinely after an applicant fills out a fairly detailed 'Solicitor's Registration Form'").

79. *Id.* at 153.

80. *Id.* at 156 ("Petitioners did not apply for a permit.").

81. *Id.* at 157-58 ("Although Jehovah's Witnesses do not consider themselves to be 'solicitors' because they make no charge for their literature or their teaching, leaders of the church testified at trial that they would honor 'no solicitation' signs in the Village."). They also explained at trial that they did not apply for a permit because they derive their authority to preach from Scripture. *Id.* at 158 ("For us to seek a permit from a municipality to preach we feel would almost be an insult to God.").

without cost to anyone interested in reading it.”⁸² They claimed that they did not “solicit contributions or orders for the sale of merchandise or services,”⁸³ although they were willing to accept donations.⁸⁴

The Village argued that it had legitimate interests which were served by the ordinance—the protection of privacy and the prevention of fraud and crime.⁸⁵ While accepting that these were important interests,⁸⁶ the Court nonetheless was not persuaded by the Village’s argument. The Court noted its long history of invalidating door-to-door canvassing restrictions as part of its analysis,⁸⁷ commenting that it was no accident that “most of these cases involved First Amendment challenges brought by Jehovah’s Witnesses, because door-to-door canvassing is mandated by their religion.”⁸⁸ Further, the Court made clear that its decision to invalidate the statute did not depend on the claim that funds were not being solicited,⁸⁹ explaining that because of the lack of “significant financial resources, the ability of the Witnesses to proselytize is seriously diminished by regulations that burden their efforts to canvass door-to-door.”⁹⁰ The Court distinguished what was before it from, for example, regulations designed to prevent fraud by door-to-door salespeople, saying, “[e]ven if the interest in preventing fraud could adequately support the ordinance insofar as it applies to commercial transactions and the solicitation of funds, that interest provides no support for its application to petitioners, to political campaigns, or to enlisting support for unpopular causes.”⁹¹ Thus, the Court made clear that this kind of solicitation was different from other kinds of solicitation and was entitled to more protection.

Once again, while striking the statute, the Court mentioned but did not rely on the fact that registration imposed a special burden on those who believed that seeking a permit would itself be a violation of their religious beliefs.⁹² Rather, the Court focused on the breadth of the ordi-

82. *Id.* at 153.

83. *Id.*

84. *Id.*

85. *Id.* at 164-65 (“The Village argues that three interests are served by its ordinance: the prevention of fraud, the prevention of crime, and the protection of residents’ privacy.”).

86. *See id.* at 165 (“We have no difficulty concluding, in light of our precedent, that these are important interests that the Village may seek to safeguard through some form of regulation of solicitation activity.”).

87. *Id.* at 160.

88. *Id.*

89. *Cf. supra* notes 44-51 and accompanying text (discussing the *Murdock* Court’s refusal to base its decision on whether funds were being solicited).

90. *Stratton*, 536 U.S. at 161.

91. *Id.* at 168.

92. *See id.* at 167 (“requiring a permit as a prior condition on the exercise of the right to speak imposes an objective burden on some speech of citizens holding religious or patriotic views”); *see also* Kathryn Lusty, *Proselytizers, Pamphleteers, Pests, and Other First Amendment Champions: Watchtower Bible and Tract Society of New York, Inc. v. Vill. of Stratton*, 18 BYU J. PUB. L. 229, 233 (2003) (“[T]he idea of applying for the imprimatur of Stratton’s municipal bureaucracy repulsed and offended the Witnesses, who instead sought a federal court injunction.”).

nance, noting that the "mere fact that the ordinance covers so much speech raises constitutional concerns."⁹³

The Court accepted that the prevention of crime was a legitimate state interest but was unconvinced that the ordinance was well-tailored to achieve that interest, noting that "it seems unlikely that the absence of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance."⁹⁴ The Court further noted "an absence of any evidence of a special crime problem related to door-to-door solicitation in the record."⁹⁵ Indeed, Justice Breyer noted in his *Stratton* concurrence that the Court has "never accepted mere conjecture as adequate to carry a First Amendment burden."⁹⁶

An examination of the *Lovell-Stratton* line of cases might seem to reveal a consistent approach with respect to religious proselytizing. Yet, this apparent consistency is deceptive if only because the cases are so similar. One cannot tell, for example, whether the Court has endorsed a robust right to proselytize in a variety of contexts or, instead, has simply recognized a relatively limited right, for example, involving door-to-door solicitation. In the long period between *Martin* and *Stratton*,⁹⁷ the Court decided a few major cases that involved religious proselytizing but did not involve door-to-door solicitation and also did not involve Jehovah's Witnesses. Regrettably, the Court obscured rather than clarified the relevant jurisprudence when handing down those opinions.

II. TIME, PLACE, MANNER REGULATIONS

A discussion of the constitutional protections afforded to proselytizing should also include a case decided in the 1980s and two companion cases decided in the 1990s. These cases, all involving ISKCON, cloud the jurisprudence considerably, if only because the Court does so much to undercut the constitutional protections allegedly afforded to proselytizing. It is simply unclear what implications these cases have for proselytizing jurisprudence more generally, because they involve several variables not in the other cases. Nonetheless, some interpretations of these cases and the jurisprudence more generally must be rejected and others accepted with qualification because those interpretations only capture some of the conflicting elements in the case law. Basically, when one considers the ISKCON cases, the proselytizing jurisprudence seems

Justice Scalia in his concurrence suggested that such a burden would not itself justify an exemption from the statute, writing, "[i]f a licensing requirement is otherwise lawful, it is in my view not invalidated by the fact that some people will choose, for religious reasons, to forgo speech rather than observe it." *Stratton*, 536 U.S. at 171 (Scalia, J., concurring).

93. *Stratton*, 536 U.S. at 165.

94. *Id.* at 169.

95. *Id.*

96. *Id.* at 170 (Breyer, J., concurring) (quoting *Nixon v. Shrink Miss. Gov't. PAC*, 528 U.S. 377, 392 (2000)).

97. *Martin* was decided in 1943 and *Stratton* was decided in 2002.

much less clear and the protections afforded to private proselytizing much less robust.

A. Restricting Where Solicitation Can Occur

Many of the religious solicitation regulations struck down by the Court involved attempts to regulate solicitation through licensing or fee requirements.⁹⁸ The Court worried that such regulations, if upheld, had the potential to cripple solicitation attempts by religious groups,⁹⁹ thereby both limiting speech and impairing the financial health of the religious organization. When similar concerns were implicated in *Heffron v. International Society for Krishna Consciousness, Inc.*,¹⁰⁰ the Court suddenly and inexplicably seemed to downgrade the importance of religious organizations being able to maintain financial health or even distribute written literature, while maintaining the importance of such organizations being able to engage in oral expression.

In *Heffron*, the Court considered whether the Constitution permits a state to require religious groups soliciting donations at a state fair to do so only within a booth, even if such a requirement would impose a limitation on the group's religious practices.¹⁰¹ The challenged rule did not prevent the group's members from having "face-to-face discussions"¹⁰² anywhere in the fair; its focus instead was on where the group's members could seek donations or hand out written literature.¹⁰³

The Court noted both that ISKCON wanted to proselytize at the Minnesota State Fair because it believed that it could do so successfully,¹⁰⁴ and that the group believed that it could only be successful if it could stop people and solicit donations as those people walked about the Fair.¹⁰⁵ The Court reiterated the established understanding both that the oral and written dissemination of ISKCON's religious views are protected speech,¹⁰⁶ and that the fact that the materials are sold rather than handed out for free does not somehow waive or destroy those rights.¹⁰⁷

98. See *supra* notes 7-96 and accompanying text (discussing many of the licensing and permit cases in which solicitation was regulated).

99. See *supra* notes 63-65 and accompanying text (discussing the fear that regulation might make it impossible for religious groups to spread their message).

100. 452 U.S. 640 (1981).

101. *Id.* at 642.

102. *Id.* at 643-44.

103. *Id.* at 644.

104. *Id.* at 653.

105. *Id.* ("In its view, this can be done only by intercepting fair patrons as they move about, and if success is achieved, stopping them momentarily or for longer periods as money is given or exchanged for literature.").

106. *Id.* at 647 ("The State does not dispute that the oral and written dissemination of the Krishnas' religious views and doctrines is protected by the First Amendment." (citing *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939) and *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938))).

107. *Id.* ("Nor does [the State] claim that this protection is lost because the written materials sought to be distributed are sold rather than given away or because contributions or gifts are solicited in the course of propagating the faith.").

Given that the dissemination of religious views was protected and that seeking donations did not somehow waive those protections, it seemed that the *Heffron* Court's analysis would follow the kinds of analyses offered in *Lovell*, *Cantwell*, *Murdock* and *Martin*.¹⁰⁸ However, the *Heffron* Court explained, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."¹⁰⁹ Rather, First Amendment freedoms are subject to "reasonable time, place, [and] manner restrictions,"¹¹⁰ and the Court suggested that the relevant legal question was whether the rule at issue was a "permissible restriction on the place and manner of communicating the views of the Krishna religion."¹¹¹

When offering its constitutional analysis, the *Heffron* Court explained that the rule at issue did not suffer from some of the obvious defects that the Court had seen in other proselytizing cases. For example, the Court noted that "[s]pace in the fairgrounds is rented to all comers in a nondiscriminatory fashion on a first-come, first-served basis,"¹¹² and that the rental rates were not intended to discourage speech, since the "charge [was] based on the size and location of the booth."¹¹³ Indeed, to illustrate how evenhanded the system was, the Court pointed out that the rule "applies alike to nonprofit, charitable, and commercial enterprises,"¹¹⁴ noting with approval that the rule at issue was "not open to the kind of arbitrary application that this Court has condemned as inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view."¹¹⁵ Yet, the fact that the challenged rule did not contain these defects did not establish that the rule was free from all defects, especially considering that application of the rule to ISKCON might make it extremely difficult for that group to raise money.¹¹⁶

When the *Murdock* Court examined a tax on itinerant preachers, it noted that imposing a tax on "the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy."¹¹⁷ While *Heffron* did not in-

108. Indeed, *Lovell*, *Murdock*, and *Cantwell* are all cited in the opinion. *Id.*

109. *Id.*

110. *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972)).

111. *Id.* at 648.

112. *Id.* at 644.

113. *Id.*

114. *Id.*

115. *Id.* at 649.

116. See *infra* notes 133-34 and accompanying text.

117. *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943); see also *Follett v. Town of McCormick*, 321 U.S. 573, 579 (Murphy, J., concurring) ("It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds.").

volve a tax, it nonetheless involved monies that would have to be paid if ISKCON was to distribute written materials or solicit donations.¹¹⁸ Further, monies were at issue in a different sense as well, because the ordinance was limiting the effectiveness of the solicitations. Thus, even had the state not been renting the booths but instead had merely required that all solicitation be performed in booths,¹¹⁹ the suit presumably still would have been brought, precisely because ISKCON would suffer opportunity costs by being required to do all solicitation from within a booth.

The *Heffron* Court placed some emphasis on the “nondiscriminatory fashion” in which the booths were rented¹²⁰ and that the rental rates were tied to the size and location of the booth.¹²¹ Yet, one infers, these very same factors would not have won the day in *Murdock*. For example, the *Murdock* Court rejected the contention that the ordinance at issue should be upheld because it was not in fact particularly onerous to pay,¹²² and the fact that the ordinance was “nondiscriminatory”¹²³ did not render it immune from further constitutional review. Indeed, the *Murdock* Court criticized the tax, notwithstanding its facial neutrality,¹²⁴ because it was “fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues.”¹²⁵ Yet, the same point might have been made about the system in place at the Minnesota State Fair, since the flat rates were tied to the size of the booths rather than realized gains.

The *Heffron* Court criticized the Minnesota Supreme Court for only considering the burdens on the state that would have been imposed by creating an exception for ISKCON.¹²⁶ At least one of the important issues to resolve involved the proper focus of analysis, for example, whether the Minnesota Supreme Court instead should have considered how much of a burden would have been imposed on the state had those religious groups who made “peripatetic solicitation as part of a church

118. While oral advocacy was permitted anywhere in the Fair, even the distribution of written material for free had to occur from within a booth. See *Heffron*, 452 U.S. at 644.

119. The *Heffron* Court noted that the rental rates were not being contested. *Id.* at 644 n.4 (“The propriety of the fee is not an issue in the present case.”).

120. *Id.* at 644.

121. *Id.*

122. *Murdock*, 319 U.S. at 112-13 (rejecting the contention that “the fact that the license tax can suppress or control this activity is unimportant if it does not do so”); see also *id.* at 118 (Reed, J., dissenting) (“This dissent does not deal with an objection which theoretically could be made in each case, to wit, that the licenses are so excessive in amount as to be prohibitory. This matter is not considered because that defense is not relied upon in the pleadings, the briefs or at the bar.”).

123. *Id.* at 115 (“The fact that the ordinance is ‘nondiscriminatory’ is immaterial. The protection afforded by the First Amendment is not so restricted.”).

124. See *id.* at 106 (“For one day \$1.50, for one week seven dollars (\$7.00), for two weeks twelve dollars (\$12.00), for three weeks twenty dollars (\$20.00). . . .”).

125. *Id.* at 113.

126. *Heffron*, 452 U.S. at 652 (“As we see it, the Minnesota Supreme Court took too narrow a view of the State’s interest in avoiding congestion and maintaining the orderly movement of fair patrons on the fairgrounds. The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON.”).

ritual”¹²⁷ been relieved of the burden of solely soliciting funds from booths¹²⁸ or, perhaps, had religious groups as a general matter been relieved of that burden. Had the Minnesota Supreme Court not solely focused on the burden created by exempting ISKCON but instead focused on the burden which would be imposed on the state by exempting religious groups in general from the in-booth requirement, it would only have been following the example set by the *Murdock* Court when it had restricted its analysis to “a single issue—the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities.”¹²⁹

To ask how much of a burden would have been imposed on the state by exempting religious groups generally is not to answer it. It is simply unclear, for example, how much of a burden would have been imposed on the state by exempting those religious groups who had ritualized solicitation or, perhaps, by exempting religious groups more generally from the requirement. Religious groups were already permitted to walk the grounds to engage in oral advocacy, so if a religious group exemption had been recognized it is at best unclear which groups would then have taken the opportunity to solicit throughout the fair or whether the traffic flow would have been greatly affected.¹³⁰ Neither the Minnesota Supreme Court nor the United States Supreme Court speculated about who might decide to take advantage of any recognized proselytizing exemption, although the United States Supreme Court did note some of the religious groups who already had a presence at the State Fair.¹³¹ In any event, the Minnesota Supreme Court had already found that the state would not have been severely burdened by affording the Krishnas an exemption,¹³² and it would seem at best speculative to claim that a somewhat broader exemption would create severe traffic difficulties.

The *Murdock* Court suggested that the “power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down,”¹³³ a point

127. See *id.*

128. Cf. Brian Freeman, *Expiating the Sins of Yoder and Smith: Toward a Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 64 (2001) (“No other religions are known to require its members, as a religious ritual, to distribute and sell religious literature and to solicit donations.”).

129. *Murdock*, 319 U.S. at 110.

130. E.g., Ronald Baxt Turovsky, *Heffron v. International Society for Krishna Consciousness, Inc.: Confusing Free Speech with Free Exercise Rights*, 71 CAL. L. REV. 1012, 1027 (1983) (“Considering the small number of groups that could have made the religious claim, and the fact that all persons or groups could make speeches, argue, and proselytize within the fairground, the additional congestion caused by . . . [granting the exemption] would not have been so overwhelming as to render the system unworkable.”).

131. See *Heffron*, 452 U.S. at 644 n.5 (mentioning the Church of Christ and the Twin Cities Baptist Messianic Witness among others).

132. *Id.* at 652 (“the court concluded that although some disruption would occur from such an exemption, it was not of sufficient concern to warrant confining the Krishnas to a booth.”).

133. *Murdock*, 319 U.S. at 113.

which analogously applies to the Minnesota regulation. If requiring the Krishnas to solicit from their booths would preclude them from soliciting effectively,¹³⁴ that would make the booth requirement as potent as the power of censorship. Basically, by restricting ISKCON to soliciting from within a booth, the Court may have upheld a policy which in effect prevented solicitation by that group entirely.

Murdock is instructive in yet another respect. Just as one of the fears articulated in *Murdock* was that itinerant preachers would be taxed in several localities, making it even more difficult for them to proselytize, an analogous fear would be that many other event organizers would similarly limit where solicitation could take place.¹³⁵ Were that to occur, solicitation by ISKCON might effectively be precluded in a whole host of venues.

The state's asserted interest in having the rule was "the need to maintain the orderly movement of the crowd given the large number of exhibitors and persons attending the Fair."¹³⁶ The Court believed that the proper way to analyze the issue was not only to consider the added disruption which might be caused were an exception made for the Krishnas,¹³⁷ but to consider how much potential disorder might be caused were the state required to permit many more groups to solicit freely.¹³⁸ After all, the Court reasoned, religious organizations do not

enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize. These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature.¹³⁹

Indeed, when offering its analysis, the Court did not limit its focus to political, religious, or charitable organizations, noting that the "question would also inevitably arise as to what extent the First Amendment also gives commercial organizations a right to move among the crowd to dis-

134. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 506 F. Supp. 147, 156 (N.D.N.Y. 1980) ("The Krishnas state flatly that they cannot practice Sankirtan from the confines of a fair booth. They base this conclusion on both religious dogma and considerations of practicality.").

135. See, e.g., *id.* at 153 (noting that Krishnas also solicit at airports, bus terminals, expressway rest stops, shopping centers, parks national monuments, naval bases, conventions centers, football games and horse and auto race tracks among other places).

136. *Heffron*, 452 U.S. at 649-50.

137. *Id.* at 652 ("As we see it, the Minnesota Supreme Court took too narrow a view of the State's interest in avoiding congestion and maintaining the orderly movement of fair patrons on the fairgrounds. The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON.").

138. *Id.* at 653 ("Obviously, there would be a much larger threat to the State's interest in crowd control if all other religious, nonreligious, and noncommercial organizations could likewise move freely about the fairgrounds distributing and selling literature and soliciting funds at will.").

139. *Id.* at 652-53.

tribute information or to sell their wares as respondents claim they may do."¹⁴⁰

If all of these groups had to be accorded the same rights, then the burden imposed on the state by making an exception for ISKCON had the potential to be quite great. The Court reasoned that an exemption for ISKCON could not "be meaningfully limited to ISKCON, and as applied to similarly situated groups would prevent the State from furthering its important concern with managing the flow of the crowd."¹⁴¹ Yet, it was not at all clear that the Court was correct when claiming that no meaningful limitations could be offered. The Court wrote:

None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize. These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature.¹⁴²

Yet, this is false. The Court has indeed suggested that solicitation that is part of a ritual is entitled to special protection, having likened it to other protected religious practices. Indeed, the *Murdock* Court suggested that "the hand distribution of religious tracts is . . . [a] form of religious activity [which] occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits,"¹⁴³ expressly contrasting religious sales with mere commercial sales and suggesting that the latter could more readily be limited or prohibited than the former.¹⁴⁴ Further, as Justice Brennan noted in his concurring and dissenting opinion in *Heffron*, "governmental regulations which interfere with the exercise of specific religious beliefs or principles should be scrutinized with particular care."¹⁴⁵

At least a few points might be made about the *Heffron* Court's analysis. Nowhere in the series of cases in which the Court examined limitations on the rights of Jehovah's Witnesses to solicit funds did the

140. *Id.* at 653.

141. *Id.* at 654.

142. *Id.* at 652-53.

143. *Murdock v. Pennsylvania*, 319 U.S. 105, 108-09 (1943).

144. *See supra* notes 45-47 and accompanying text.

145. *Heffron*, 452 U.S. at 660 n.3 (Brennan, J., concurring in part and dissenting in part); *see also* Turovsky, *supra* note 130, at 1023-24 ("The Court erred in equating ISKCON's free exercise claim with the speech rights of secular groups at the fair. The free speech and free exercise tests are different. A religious claimant such as ISKCON has greater protection under the free exercise clause than under the free speech clause.").

Court suggest that the state was prohibited from imposing limitations on merely commercial activities, so the Court's invoking the specter of various commercial vendors hawking their wares throughout the State Fair was simply an exercise in misdirection. Further, there are obvious differences between commercial vendors, who might well be quite successful even when vending from a booth, and others wishing to receive monies, who might well find their success dependent upon not being geographically restricted.¹⁴⁶ Indeed, different religious groups might have varying degrees of success when attempting to distribute literature or raise monies from booths.¹⁴⁷

The *Heffron* Court noted in passing that ISKCON members were permitted to walk the grounds discussing their religious views. This means that the State was willing to permit ISKCON members to engage in possibly long religious discussions thereby impeding traffic flow, as long as they did not at the same time solicit funds. Yet, solicitation of funds might involve *less* of an obstruction to traffic flow than would oral advocacy. Solicitation might involve one or a few people stopping momentarily to give money, while oral advocacy would be more likely to attract a crowd, especially if one or more individuals of differing views wished to engage in a debate.

One of the most confusing elements of *Heffron* was why the Court chose to offer the analysis that it did. Apparently, ISKCON had not argued that it was entitled to special consideration because its solicitation was part of a religious ritual.¹⁴⁸ The Court might simply have chosen not to address whether ritualized solicitation practices pose special constitutional concern, and might instead have addressed the matter as applied to any group challenging the rule. In that way, the Court simply would not have offered any comments about the kinds of exceptions that should be made so that free exercise guarantees would not be violated.¹⁴⁹

146. *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 506 F. Supp. 147, 156 (N.D.N.Y. 1980) ("The Krishnas further maintain that, from a practical point of view, the fair goers are unlikely on their own to go out of their way to find a Krishna booth at the State Fair. This being the case, the Krishnas would be denied or restricted in their opportunity to spread the 'truth,' solicit contributions, and gain converts.").

147. See Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439, 447 (1995) ("The unpopular must go to the mountain, we said, for the mountain will not come to them. Minnesotans will flock to the booths of the Methodists, Presbyterians or Episcopalians, but if Hare Krishna devotees sit in their booth waiting for listener-initiated contact, they will have a long and very quiet day.").

148. See *Heffron*, 452 U.S. at 660 n.3 (Brennan, J., concurring in part and dissenting in part) ("In their brief and in oral argument, however, respondents emphasize that they do not claim any special treatment because of Sankirtan, but are willing to rest their challenge wholly upon their general right to free speech, which they concede is identical to the right enjoyed by every other religious, political, or charitable group.").

149. See *id.* at 660 n.3 (Brennan, J., concurring in part and dissenting in part) ("Having chosen to discuss it, however, the Court does so in a manner that is seemingly inconsistent with prior case law.").

In the Jehovah's Witnesses cases, the Court viewed the breadth of the ordinance as itself raising constitutional concerns.¹⁵⁰ In contrast, the *Heffron* Court implied that the regulation's breadth was the reason to uphold the regulation, claiming that the inability to make distinctions and thus limit the exemption would make crowd control very difficult. Yet, the Court's claimed inability to make distinctions was belied by its own analyses in other cases, even if one brackets the religion factor.

In *Village of Schaumburg v. Citizens for a Better Environment*,¹⁵¹ the Court laid out some of the factors that must be considered when judging the constitutionality of state regulations of solicitation. There must be:

due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.¹⁵²

Here, the *Schaumburg* Court is suggesting that one of the factors that must be considered in any analysis restricting solicitation is how much of a burden would thereby be placed on the group seeking funds. Both in *Schaumburg* and in the Jehovah's Witnesses line of cases, the Court is thus offering yet another way to distinguish among groups that might be affected by solicitation regulations, namely, whether imposing the limitation at issue would severely impair the ability to raise money or, perhaps, bring about the group's financial ruin. Given that the Court mentioned ISKCON's claim that its being confined to a booth would severely hamper its attempt to raise monies, one might have expected the Court to offer a more detailed analysis regarding why that consideration did not win the day. The Court offered no such analysis and did not even consider whether such a rule would in effect prohibit the Krishnas from soliciting at the State Fair, instead merely announcing that it was "unwilling to say that Rule 6.05 does not provide ISKCON and other organizations with an adequate means to sell and solicit on the fairgrounds."¹⁵³

One issue mentioned in *Heffron* was given much too little discussion. The Court noted the state's claims that the rule "forwards the State's valid interest in protecting its citizens from fraudulent solicitations, deceptive or false speech, and undue annoyance,"¹⁵⁴ but then said that in "light of our holding that the Rule is justified solely in terms of

150. See *supra* note 93 and accompanying text.

151. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980).

152. *Id.* at 632.

153. *Heffron*, 452 U.S. at 655.

154. *Id.* at 650 n.13 (citing *Schaumburg*, 444 U.S. 620).

the State's interest in managing the flow of the crowd, we do not reach whether . . . [this other purpose is] constitutionally sufficient to support the imposition of the Rule."¹⁵⁵ Justice Brennan in his concurrence and dissent took a different tack, suggesting that the record supported the state's claim that it needed the rule to prevent fraud, although he did not specifically discuss what in the record led him to that conclusion.¹⁵⁶

While the Court expressly declined to decide whether prevention of fraud would suffice to justify the ordinance,¹⁵⁷ it seems safe to assume that the Justices were considering the fraud aspect of the case, given the majority's *express* refusal to decide whether that would suffice as a justification and Justice Brennan's reliance on that factor. Further, Justice Blackmun in his *Heffron* concurrence and dissent also indicated that he was considering the fraud factor. However, he expressly rejected the fraud rationale because there was:

nothing in this record to suggest that it is more difficult to police fairgrounds for fraudulent solicitations than it is to police an entire community's streets; just as fraudulent solicitors may "melt into a crowd" at the fair, so also may door-to-door solicitors quickly move on after consummating several transactions in a particular neighborhood.¹⁵⁸

Thus, Justices Brennan and Blackmun each suggested that fraudulent solicitation was a problem at the Fair, although they disagreed about whether other, more limited measures might be taken which would suffice to prevent that evil.

There might have been at least two unarticulated reasons that would help explain why the Court did not rely on the fraud rationale. First, ISKCON had mounted a facial challenge to the ordinance. Even were the Krishnas fraudulently inducing individuals to donate, that would not resolve the constitutionality of the ordinance—the Court still would have had to decide whether the regulation was substantially overbroad.¹⁵⁹ For example, if the regulation prevented a variety of other groups from non-fraudulently engaging in protected expression, then the regulation might be struck down even if the appellants could not themselves claim that the

155. *Id.*

156. *Id.* at 657 (Brennan, J., concurring in part and dissenting in part) ("[B]ecause I believe on this record that this latter interest is substantially furthered by a Rule that restricts sales and solicitation activities to fixed booth locations, where the State will have the greatest opportunity to police and prevent possible deceptive practices, I would hold that Rule 6.05's restriction on those particular forms of First Amendment expression is justified as an antifraud measure.").

157. See *supra* notes 154-55 and accompanying text

158. *Heffron*, 452 U.S. at 664 (Blackmun, J., concurring in part and dissenting in part).

159. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) ("[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.").

regulation was preventing them from engaging in protected expression.¹⁶⁰

Second, it was not at all clear that the record revealed fraudulent activity by the Krishnas at the Minnesota State Fair. Indeed, the Minnesota Supreme Court implied that the record did not contain the damning evidence that one might have inferred was there, suggesting instead that claims about fraudulent behavior had been made elsewhere.¹⁶¹

By focusing on crowd control rather than fraud, the Court was able to avoid the difficulties inherent in claiming that the regulation was well-tailored to prevent fraud, given the absence of evidence of fraud at the Fair. However, the Court's claims about the need for crowd control seemed rather speculative, especially because the Court overestimated the difficulties in crafting an exemption which would have permitted some but not others to distribute literature and solicit donations outside of booths.¹⁶² This makes the Court's justification rather tenuous—as later explained by Justice Breyer in his *Stratton* concurrence, speculation will not suffice to defeat a First Amendment claim.¹⁶³

In his *Heffron* concurrence and dissent, Justice Blackmun accepted the Court's crowd control rationale at least with respect to solicitation, arguing that "common-sense differences between literature distribution, on the one hand, and solicitation and sales, on the other, suggest that the latter activities present greater crowd control problems than the former."¹⁶⁴ For example, Justice Blackmun noted that the "distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead, the recipient is free to read the message at a later time."¹⁶⁵ Precisely because the reader might decide not to read the literature immediately, Justice Blackmun noted that "literature distribution may present even fewer crowd control problems than the oral proselytizing that the State already allows upon the fairgrounds."¹⁶⁶ In contrast, where money is changing hands, there is a greater likelihood that foot traffic will be slowed, because "sales and the collection of solicited funds not only require the fairgoer to stop, but also

160. See *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 633-34 (1980) ("We agree with the Court of Appeals that CBE was entitled to its judgment of facial invalidity if the ordinance purported to prohibit canvassing by a substantial category of charities to which the 75-percent limitation could not be applied consistently with the First and Fourteenth Amendments, even if there was no demonstration that CBE itself was one of these organizations.").

161. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Heffron*, 299 N.W.2d 79, 85 (Minn. 1980) ("Although we are limited by the record in this case, we recognize that an additional concern of defendants may involve the manner in which some members of ISKCON are reputed to practice Sankirtan." (emphasis added)).

162. See *supra* notes 126-53 and accompanying text.

163. See *supra* note 96 and accompanying text.

164. *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 665 (1981) (Blackmun, J., concurring in part and dissenting in part).

165. *Id.*

166. *Id.*

'engender additional confusion . . . because they involve acts of exchanging articles for money, fumbling for and dropping money, making change, etc.'"¹⁶⁷

A few points might be made about Justice Blackmun's common-sense observation. First, it undercuts the constitutionality of the state's requirement that all literature be distributed from booths. Oral advocacy might be expected to cause more crowd control problems than would handing out free written materials, because those materials might be read at the recipient's leisure. If the worry really was that traffic control and oral advocacy would be more likely to disrupt traffic patterns than would the distribution of free literature, then one would expect the Court to strike down the restriction on the distribution of free literature outside of booths. Second, while Justice Blackmun's common-sense observation is accurate as far as it goes, he does not thereby settle the relevant constitutional question, which involves *how much* more difficult it would be to control crowds if solicitation were permitted, which itself depends upon how many groups would seek to solicit. Common sense would not be particularly helpful in determining whether the increased burden would be enough to justify the prohibition. Indeed, one might expect that intermediate scrutiny¹⁶⁸ would require a more persuasive analysis than just an appeal to common sense, especially where the relevant question is not merely whether traffic flow problems would be greater were an exemption recognized but whether the increase would be sufficiently onerous to justify the regulation at issue.

B. Solicitation and Literature Distribution at Airports

In *Heffron*, the Court upheld a regulation which limited sankirtan¹⁶⁹ to booths. At issue in *International Society for Krishna Consciousness, Inc. v. Lee*¹⁷⁰ was a ban on sankirtan in airport terminals—the challenged regulation prohibited “the repetitive solicitation of money or distribution of literature”¹⁷¹ within the Newark International Airport, John F. Kennedy International Airport, and La Guardia Airport terminals.¹⁷²

167. *Id.* (citing *Int'l Soc'y for Krishna Consciousness, Inc. v. Heffron*, 299 N.W.2d 79, 87 (Minn. 1980)).

168. See Kevin Francis O'Neill, *Privatizing Public Forums to Eliminate Dissent*, 5 FIRST AMEND. L. REV. 201, 223 (2007) (discussing “the intermediate scrutiny normally reserved for content-neutral time, place, and manner restrictions”).

169. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 674-75 (1992) (“[The] ritual known as *sankirtan* . . . consists of ‘going into public places, disseminating religious literature and soliciting funds to support the religion.’” (citing *Int'l Society for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 577 (2d Cir. 1991))).

170. *Id.* at 672. Below, this opinion will be referred to as “*ISKON*.” The companion case, *Lee v. International Society for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) will be referred to as “*Lee*.”

171. *ISKON*, 505 U.S. at 675.

172. See *id.*

In upholding the ban on sankirtan in these terminals, the *ISKCON* Court explained both that individuals wishing to avoid the Krishnas' solicitation "may have to alter their paths, slowing both themselves and those around them,"¹⁷³ and that "[d]elays may be particularly costly in this setting, as a flight missed by only a few minutes can result in hours worth of subsequent inconvenience."¹⁷⁴ The Court further noted that "face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation."¹⁷⁵

Perhaps as a way of establishing that the Port Authority was providing a reasonable alternative whereby ISKCON would still be able to communicate its message, the Court noted that the Port Authority permitted solicitation and distribution of materials "in the sidewalk areas outside the terminals,"¹⁷⁶ an "area . . . frequented by an overwhelming percentage of airport users."¹⁷⁷ Indeed, Justice Kennedy in his concurrence suggested that the regulation passed muster precisely because there were "ample alternative channels for communication."¹⁷⁸

Yet, the Port Authority's willingness to permit sankirtan in the sidewalk areas around the terminals cuts both ways. Worries justifying regulation within the terminal would also justify regulation outside of the terminal—individuals hurrying to a plane might be delayed whether within or immediately outside the terminal, and people rushing to a plane who are stopped to receive literature or make a donation might feel coerced or under duress whether within or outside the terminal.¹⁷⁹ If the Port Authority did not feel these concerns justified preventing distribution and solicitation outside the terminal,¹⁸⁰ it is not clear why they would justify preventing solicitation within the terminal.

Many of the justifications cited by the Court for upholding a ban on sankirtan within the terminal would also seem to justify a ban on the

173. *Id.* at 683.

174. *Id.* at 684.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 707 (Kennedy, J., concurring).

179. *Cf. ISKCON Miami, Inc. v. Metro. Dade County, Florida*, 147 F.3d 1282, 1287 (11th Cir. 1998) (upholding bans on solicitation and sales of materials on sidewalks adjacent to Miami International Airport for same reasons that such bans were permissible inside the airport).

180. It might be argued that the sidewalks outside the terminal were public fora and thus the test for prohibiting speech there was much more onerous for the government to meet. However, just as the Court used *United States v. Kokinda*, 497 U.S. 720 (1990) to justify its employing a more deferential test to determine whether the government's prohibition within the terminal passed constitutional muster, *see ISKCON*, 505 U.S. at 678, the Court might also have cited *Kokinda* for the proposition that the sidewalks next to the airport were not public fora. After all, *Kokinda* held that the sidewalks leading to a post office were not public fora. *See Kokinda*, 497 U.S. at 730 (holding that the sidewalk leading to the post office was not a public forum).

distribution of literature within the terminal.¹⁸¹ Yet, in *Lee v. International Society for Krishna Consciousness, Inc.*,¹⁸² the Court struck down the limitations on the distribution of literature within the terminals in a per curiam opinion.¹⁸³

One of the interesting aspects of the *Lee* opinion was the Court's justification for its position. Rather than articulate a rationale, the Court simply said that for the "reasons expressed in the [*ISKCON*] opinions of Justice O'Connor, Justice Kennedy and Justice Souter, . . . the judgment of the Court of Appeals holding that the ban on distribution of literature in the Port Authority airport terminals is invalid under the First Amendment is Affirmed."¹⁸⁴

The Court's citing to rather than repeating the different *ISKCON* opinions would not be worthy of comment were all of those opinions basically making the same points. However, there were profound disagreements among these opinions about, for example, whether an airport should be considered a public forum,¹⁸⁵ which test should be used to determine the constitutionality of the policies at issue,¹⁸⁶ and which practices, if any, could be prohibited without offending the relevant test.¹⁸⁷ By referring to those opinions without explaining which aspects of those opinions persuaded the *Lee* majority, the Court was able to avoid the

181. See *Lee*, 505 U.S. 830, 831 (1992) (Rehnquist, C.J., dissenting) ("[T]he risks and burdens posed by leafletting are quite similar to those posed by solicitation.").

182. *Id.* at 830.

183. See *id.* at 831 (affirming the local court holding that the ban on the distribution of literature in the terminals was unconstitutional).

184. *Id.*

185. Compare *ISKCON*, 505 U.S. at 686 (O'Connor, J., concurring) ("I . . . agree that publicly owned airports are not public fora.") with *id.* at 693 (Kennedy, J. concurring in the judgment) ("In my view the airport corridors and shopping areas outside of the passenger security zones, areas operated by the Port Authority, are public forums, and speech in those places is entitled to protection against all government regulation inconsistent with public forum principles.") and *id.* at 709-10 (Souter, J., with whom Justice Blackmun and Justice Stevens join, dissenting) ("I agree with Justice Kennedy's view of the rule that should determine what is a public forum and with his conclusion that the public areas of the airports at issue here qualify as such.").

186. Compare *id.* at 688 (O'Connor, J., concurring) ("We have said that a restriction on speech in a nonpublic forum is 'reasonable' when it is 'consistent with the [government's] legitimate interest in 'preserv[ing] the property . . . for the use to which it is lawfully dedicated.'" (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50-51 (1983))) with *id.* at 703 (Kennedy, J. concurring) ("The regulation is in fact so broad and restrictive of speech, Justice O'Connor finds its void even under the standards applicable to government regulations in nonpublic forums I have no difficulty deciding the regulation cannot survive the far more stringent rules applicable to regulations in public forums. The regulation is not drawn in narrow terms, and it does not leave open ample alternative channels for communication." (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))).

187. Compare *id.* at 703 (Kennedy, J. concurring in the judgment) ("[T]he Port Authority's ban on the 'solicitation and receipt of funds' within its airport terminals . . . may be upheld as either a reasonable time, place, manner restriction, or as a regulation directed at the nonspeech elements of expressive conduct.") with *id.* at 712 (Souter, J., with whom Justice Blackmun and Justice Stevens join, dissenting) ("Even if I assume, *arguendo*, that the ban on the petitioners' activity at issue here is both content neutral and merely a restriction on the manner of communication, the regulation must be struck down for its failure to satisfy the requirements of narrow tailoring to further a significant state interest." (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984))).

difficult but possibly helpful task of explaining why the policy at issue was unconstitutional.

Basically, the *ISKCON* majority upheld the ban on solicitation,¹⁸⁸ and the *Lee* majority struck down the ban on the distribution of literature.¹⁸⁹ Certainly, the two opinions are compatible if, for example, the distribution of literature is viewed as paradigmatic speech and solicitation is viewed as akin to commercial activity and thus more readily subject to regulation. Yet, that way of differentiating between solicitation and literature distribution runs counter to the existing jurisprudence.¹⁹⁰ If, indeed, solicitation of money in support of religion "occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits,"¹⁹¹ it might be surprising that the prohibition on the distribution of religious materials would be struck down but that the ban on solicitation would be upheld. Arguably, the distribution of religious literature is also analogous to preaching, and thus the Court would seem to be protecting one kind of preaching and not protecting another. Even more surprising are the justifications offered by some members of the Court regarding why the solicitation and literature distribution bans are so different for constitutional purposes that one but not the other could be upheld.

One of the important issues about which the Justices could not agree in *ISKCON* was whether the airport should be considered a public forum. Chief Justice Rehnquist and Justices White, Scalia, Thomas and O'Connor rejected that the airport was a public forum¹⁹² and suggested that the regulation should be upheld as long as it was reasonable.¹⁹³ Justices Kennedy, Blackmun, Stevens and Souter all suggested that the airport was a public forum,¹⁹⁴ and thus that the "regulation must be drawn in narrow terms to accomplish its end and leave open ample alternative channels for communication."¹⁹⁵

As one might expect, the *ISKCON* majority upheld the constitutionality of the solicitation ban in light of the deferential reasonableness

188. See *id.* at 685.

189. See *Lee*, 505 U.S. 830, 831 (1992) ("[T]he judgment of the Court of Appeals holding that the ban on distribution of literature in the Port Authority Airport is invalid under the First Amendment is affirmed.").

190. See *supra* notes 45-47 (discussing the rejection of the equivalence between solicitation for religious causes and solicitation for commercial causes).

191. *Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943).

192. See *ISKCON*, 505 U.S. at 679; see also *id.* at 686 (O'Connor, J., concurring) (agreeing that "publicly owned airports are not public fora").

193. See *id.* at 683 (O'Connor, J., concurring) ("The restrictions here challenged, therefore, need only satisfy a requirement of reasonableness.").

194. See *id.* at 693 (Kennedy, J., concurring) ("The airport corridors and shopping areas outside of the passenger security zones, areas operated by the Port Authority, are public forums, and speech in those places is entitled to protection against all government regulation inconsistent with public forum principles.").

195. *Id.* at 707.

test.¹⁹⁶ However, those rejecting that mere reasonableness would suffice disagreed about whether the Port Authority regulation passed the more rigorous intermediate scrutiny test. Justices Souter, Blackmun and Stevens all argued that the state's regulation had to be "struck down for its failure to satisfy the requirements of narrow tailoring to further a significant state interest,"¹⁹⁷ whereas Justice Kennedy suggested that the "Port Authority's ban on the 'solicitation and receipt of funds' within its airport terminals should be upheld under the standards applicable to speech regulations in public forums."¹⁹⁸ While the mere fact of disagreement with respect to whether a test has been met is not so unusual,¹⁹⁹ there are several considerations that make the opinion of Justice Kennedy and the opinion of Justice Souter, onto which both Justices Blackmun and Stevens signed, worth a closer look.

One element to consider when analyzing the *ISKCON* and *Lee* opinions is that three of the Justices were also on the *Heffron* Court—Chief Justice Rehnquist, and Justices Stevens and Blackmun. Chief Justice Rehnquist's opinions in *Lee* and *ISKCON* were compatible with his view in *Heffron* in that in each he suggested that the state regulation passed constitutional muster. However, one could not have predicted the positions of Justices Stevens and Blackmun in *Lee* and *ISKCON* based on their positions in *Heffron*.

Justice Stevens had signed onto Justice Brennan's *Heffron* concurrence and dissent,²⁰⁰ which suggested that the state's interest in the prevention of fraud justified the restriction at the Minnesota State Fair. Yet, one might have expected that the fraud rationale would also win the day in *ISKCON*, since that was also cited as a concern. For example, the *ISKCON* majority noted that the "unsavory solicitor can . . . commit fraud through deliberate concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase,"²⁰¹ although the fraud cited occurred in a different case.²⁰² Justice O'Connor also alluded to fraud in her concurrence—"[t]he record in this case confirms that the problems of congestion and fraud that we have identified with solici-

196. But see *infra* notes 209-18 and accompanying text (discussing Justice O'Connor's rejection of the reasonableness of the ban on the distribution of literature).

197. *ISKCON*, 505 U.S. at 712 (Souter, J., dissenting).

198. *Id.* at 703 (Kennedy, J., concurring).

199. Compare, e.g., *McCreary County v. ACLU*, 545 U.S. 844, 860, 870 (2005) (Ten Commandments display violates *Lemon*'s purpose prong) with *id.* at 902-03 (Scalia, J., dissenting) (display meets *Lemon* test).

200. See *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 656 (1981) (Brennan, J., concurring in part and dissenting in part).

201. See *ISKCON*, 505 U.S. at 684 (citing *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 506 F. Supp. 147, 159-63 (N.D.N.Y. 1980)).

202. See *id.* (citing *Barber*, 506 F. Supp. at 159-63).

tion in other contexts have also proved true in the airports' experiences."²⁰³

As had been true in *Heffron*, there was some question whether there was significant evidence of fraud in *ISKCON*. Thus, Justice Souter noted in his dissent that the "evidence of fraudulent conduct here is virtually nonexistent. It consists of one affidavit describing eight complaints, none of them substantiated, 'involving some form of fraud, deception, or larceny' over an entire 11-year period between 1975 and 1986."²⁰⁴ Yet, if the evidence of fraud in cases *not before the Court* was nonetheless enough to justify the restriction in *Heffron*,²⁰⁵ one might have expected similar evidence plus some complaints to justify the policy at issue in *ISKCON*, although it may be that Justice Stevens changed his mind about whether a restriction on solicitation was permissible primarily based on allegations of fraud occurring in another case. Indeed, one infers that the *ISKCON* majority was somewhat defensive about its assertions regarding fraud, since it felt compelled to offer a conjecture about why there were *not* many complaints alleging fraud.²⁰⁶

Justice Blackmun rejected his own *Heffron* common-sense analysis in *ISKCON*, although the *ISKCON* majority as well as Justice O'Connor in concurrence cited that reasoning to support their position.²⁰⁷ While one would infer from the Minnesota Supreme Court's opinion that there was no smoking gun in *Heffron*,²⁰⁸ it may be that both Justices Stevens and Blackmun saw something in the *Heffron* record that was not present in the *ISKCON* record.

What was most surprising were the positions offered by Justices O'Connor and Kennedy justifying their concurrences in both *ISKCON* and *Lee*. For example, Justice O'Connor agreed that the literature distribution ban was unconstitutional, notwithstanding her agreement that the relevant test was whether the restriction was "reasonable."²⁰⁹ To justify her position, she explained that while the airport was not a public forum,²¹⁰ it nonetheless should not simply be understood as having "a single purpose—facilitating air travel."²¹¹ Instead, she suggested that the "airports house restaurants, cafeterias, snack bars, coffee shops, cocktail

203. *Id.* at 690 (O'Connor, J., concurring) (citing app. 67-111 (affidavits)).

204. *Id.* at 713-14 (Souter, J., dissenting).

205. *See supra* note 161 and accompanying text (pointing out that the Minnesota Supreme Court had implied that there was little if any evidence of fraud at the Minnesota State Fair).

206. *ISKCON*, 505 U.S. at 684 ("Compounding this problem is the fact that, in an airport, the targets of such activity frequently are on tight schedules. This in turn makes such visitors unlikely to stop and formally complain to airport authorities. As a result, the airport faces considerable difficulty in achieving its legitimate interest in monitoring solicitation activity to assure that travelers are not interfered with unduly.").

207. *See id.* at 683; *see also id.* at 689-90 (O'Connor, J., concurring).

208. *See supra* notes 126-132 and accompanying text.

209. *See ISKCON*, 505 U.S. at 687 (O'Connor, J., concurring).

210. *Id.* at 686.

211. *Id.* at 688.

lounges, post offices, banks, telegraph offices, clothing shops, drug stores, food stores, nurseries, barber shops, currency exchanges, art exhibits, commercial advertising displays, bookstores, newsstands, dental offices, and private clubs.”²¹² She reasoned that the Port Authority was operating a shopping mall as well as an airport,²¹³ which was open to travelers and non-travelers alike,²¹⁴ and examined whether the restrictions were reasonable in light of “the multipurpose environment that the Port Authority has deliberately created.”²¹⁵

Justice O’Connor argued that the ban on solicitation was reasonable because it might delay travelers, since the “individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor’s literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card.”²¹⁶ She distinguished this from the individual who would just receive a leaflet, since that individual would not need to read the literature immediately and might instead decide to look at it when there was greater time.²¹⁷

Of course, she noted, merely because the distribution of literature was protected would not mean that it would be immune from content-neutral time, place, manner regulation. She pointed out:

For example, during the many years that this litigation has been in progress, the Port Authority has not banned *sankirtan* completely from JFK International Airport, but has restricted it to a relatively uncongested part of the airport terminals, the same part that houses the airport chapel. . . . In my view, that regulation meets the standards we have applied to time, place, and manner restrictions of protected expression.²¹⁸

Yet, if the Port Authority was able to operate well by using a kind of neutral time, place, manner restriction which limited *sankirtan* to uncongested areas, much of the rationale justifying the limitation of solicitation would seem to fall by the wayside. Were *sankirtan* permitted only in those areas which were not crowded, individuals who were in a hurry would presumably not stop to consider the pros and cons of contributing and individuals who might stop because they were not in a hurry would not thereby make the area too congested and delay others who were hurrying.

212. *Id.*

213. *Id.* at 689.

214. *Id.* at 688.

215. *Id.* at 689.

216. *Id.* (citing *United States v. Kokinda*, 497 U.S. 720, 733-34 (1990)).

217. *Id.* at 690.

218. *Id.* at 692-93 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

Justice O'Connor also mentioned the worry posed by fraud.²¹⁹ However, the Port Authority did not seem so worried by that, since they permitted sankirtan to be practiced during the litigation. Further, Justice O'Connor was a little circumspect when describing the kind of fraud that was allegedly taking place, neither specifying what kind of fraud had taken place nor by whom.²²⁰ For example, if the worry was that Krishnas were failing to self-identify,²²¹ then it would seem that a less onerous burden would be to require appropriate identification.²²² Further, if fraud was believed to be such a pervasive problem, it is at the very least surprising that such solicitations were permitted in the areas around the airport or in the airport during the litigation.

Justice O'Connor's analysis was surprising in yet another way. She agreed that the appropriate standard was reasonableness and cited the common-sense proposition that distribution of literature would cause fewer congestion problems than would solicitation. Yet, one might have expected Justice O'Connor to defer to the state's reasonable belief that the distribution of literature might lead people to discuss the contents of the materials, which might lead to congestion and impaired traffic flow.²²³ Thus, Justice O'Connor's explanation was surprising in that her failure to defer to the Port Authority's policy on literature distribution indicates that her reasonableness standard was somewhat more robust than one might have inferred—a deferential reasonableness standard would presumably permit a literature distribution ban in both a shopping mall and an airport. Yet, were a more robust reasonableness test employed, the Port Authority's policy on sankirtan during the litigation would suggest that the ban on solicitation was not reasonable, since sankirtan could have been permitted without unduly interfering with passengers trying to catch planes. Assuming that she is using the same reasonableness standard, it is difficult to understand why the solicitation ban was reasonable but the literature ban was not. It may be that Justice

219. *Id.* at 690 (citing app. 67-111 (affidavits)).

220. *Id.*

221. *Id.* at 684 (citing *Int'l Soc'y of Krishna Consciousness, Inc. v. Barber*, 506 F. Supp. 147, 159 (N.D.N.Y. 1980)). The New York district court noted some fraudulent practices:

For example, one ex-devotee from the Baltimore temple was sent out by her Sankirtan leader with two of the best female solicitors of the temple. She was instructed not to wear an identification badge and, if possible, to avoid verbally affiliating herself with the Krishnas to potential donors. If someone were to ask her affiliation, she was taught to try to confuse that person by slurring the word "Krishna" into sounding like the word "Christian." She was also instructed to make up "purposes" for requesting donations. For example, she was told to say that she was soliciting for worldwide education and food distribution programs or children's drug programs.

Id.

222. *Cf. Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 664 (1981) (Blackmun, J., concurring in part and dissenting in part) ("[R]espondents have offered to wear identifying tags.").

223. *See Lee*, 505 U.S. 830, 832 (1992) (Rehnquist, C.J., dissenting) ("Others may choose not simply to accept the material but also to stop and engage the leafletter in debate, obstructing those who follow.").

O'Connor is employing a less deferential reasonableness test for the literature distribution ban and a more deferential reasonableness test for the solicitation ban because she believes that speech must be given greater protection than fundraising, notwithstanding that the airport is not a public forum and notwithstanding that neither solicitation nor the distribution of literature would seem to fall within the purposes of the airport or the shopping mall.

Justice Kennedy's concurrence in the judgment in *ISKCON* was also surprising. He believed that intermediate scrutiny was the relevant test, but nonetheless felt that the state had met its burden with respect to the solicitation ban. To see why this is somewhat surprising, it is helpful to consider why he believed that the literature distribution ban could not pass muster.

Justice Kennedy noted that the Port Authority argued "that the problem of congestion in its airports' corridors makes expressive activity inconsistent with the airports' primary purpose, which is to facilitate air travel."²²⁴ However, he rejected that argument because the "First Amendment is often inconvenient"²²⁵ and "[i]nconvenience does not absolve the government of its obligation to tolerate speech."²²⁶ He noted that the "Authority has for many years permitted expressive activities by petitioners and others, without any apparent interference with its ability to meet its transportation purposes."²²⁷

Indeed, Justice Kennedy cited to Justice O'Connor's concurrence discussing the feasible alternatives that had been adopted by airports. Yet, Justice Kennedy failed to note that these alternatives also included ways that groups were permitted to solicit donations,²²⁸ and his point concerning less restrictive policies regarding the distribution of literature might also be made about solicitation policies. After all, he both recognized that "solicitation is a form of protected speech"²²⁹ and that the objectives with respect to solicitation could be achieved without banning it.²³⁰ He simply concluded that these narrower means were not constitutionally required for the solicitation policy but were required for the literature distribution policy, without adequately explaining why that was so.²³¹

224. *ISKON*, 505 U.S. at 701 (Kennedy, J., concurring).

225. *Id.*

226. *Id.*

227. *Id.*

228. *See id.* at 692 (O'Connor, J., concurring).

229. *Id.* at 704 (Kennedy J., concurring).

230. *See id.* at 707 ("other means, for example, the regulations adopted by the Federal Aviation Administration to govern its airports, may be available to address the problems associated with solicitation:").

231. *See id.* ("My conclusion is not altered by the fact that other means, for example, the regulations adopted by the Federal Aviation Administration to govern its airports, may be available to

One aspect of Justice Kennedy's analysis was especially noteworthy, namely, that the ban on the *sale* of books was unconstitutional.²³² Yet, the sale of books might lead to more congestion than would solicitation, given the greater likelihood that change might be required during a sale. Thus, if, as seems reasonable, people who make donations are more likely to give money without expecting change, e.g., by giving change themselves or by their giving a one or five dollar bill without expecting anything back in return, whereas people who make purchases are more likely to use a larger bill and expect money back, then sales might be expected to cause more foot traffic disruption than donations. While the solicitation of funds might cause more congestion than the distribution of (free) literature, e.g., because *some* individuals might need change, the solicitation of funds would presumably cause less congestion than would the sale of literature. Yet, the Port Authority's main argument was that "the problem of congestion in its airports' corridors makes expressive activity inconsistent with the airports' primary purpose,"²³³ which means that Justice Kennedy's solution would likely be more disruptive than, for example, permitting solicitation but prohibiting the sale of literature.

The majority *ISKCON* opinion refers to a district court opinion²³⁴ discussing fraudulent practices engaged in by some ISKCON members in the context of donations and sales,²³⁵ e.g., the wrong change might be given or there might be a delay giving change in the hopes that the person waiting for the correct change would grow impatient and leave.²³⁶ This kind of fraud would be more likely to occur in the context of sales than donations if only because of the greater likelihood that change might be expected by those making a purchase. Further, if the worry was that vulnerable travelers might be taken advantage of, e.g., because they are unfamiliar with local language or customs,²³⁷ sales would provide at least as great an opportunity for mischief as requests for donations.

address the problems associated with solicitation, because the existence of less intrusive means is not decisive.").

232. See *id.* at 708 ("The application of our time, place, and manner test to the ban on sales leads to a result quite different from the solicitation ban.").

233. *Id.* at 701 (majority opinion).

234. See *id.* at 684 (citing *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 506 F. Supp. 147, 159-63 (N.D.N.Y. 1980)).

235. The *Barber* opinion was referring to training allegedly given to ISKCON members. See *Barber*, 506 F. Supp. at 159-63. At issue in *Barber* were New York State Fair regulations which allegedly would have an adverse effect on ISKCON's ability to practice Sankirtan. See *id.* at 150.

236. See *id.* at 159 ("Other techniques for increasing monetary contributions included: flirting with males, attempting to get people to donate larger bills, intentionally miscounting change, folding over bills to shortchange people, and holding large bills for a long time in an effort to make the donor tired of the idea of getting the desired amount of change back.").

237. *ISKCON*, 505 U.S. at 705 (Kennedy, J., concurring) ("Travelers who are unfamiliar with the airport, perhaps even unfamiliar with this country, its customs, and its language, are an easy prey for the money solicitor.").

Justice Kennedy understood that many of his criticisms about solicitation would "apply to the sale of literature,"²³⁸ but reasoned that "sales of literature must be completed in one transaction to be workable."²³⁹ Solicitation on the other hand need not take place in one transaction—one could seek donations in one place but, for example, give the individuals envelopes and ask them to send the contributions in the mail. Yet, it is at the very least ironic that Justice Kennedy believed that the ban on literature sales must be struck down because "the Port Authority's regulation allows no practical means for advocates and organizations to sell literature within the public forums which are its airports,"²⁴⁰ given that the Court's ban on solicitation left the Krishnas no practical means by which to solicit donations within airports.

One of the confusing aspects of Justice Kennedy's *ISKCON* concurrence in the judgment is that he offered a much narrower interpretation of the regulation at issue than did the other members of the Court. In Justice Kennedy's view, the only kind of solicitation precluded in the airports was solicitation coupled with the immediate receipt of funds.²⁴¹ However, no other Justice expressed agreement with this portion of his opinion,²⁴² so it is even more unclear what to make of Justice Kennedy's concurrence or even how he would characterize the judgment with which he was concurring, since the limitation on solicitation upheld by that Court seems broader than what he said the Constitution permitted.

Although the Court never expressly discusses Justice Kennedy's interpretation, the Court presumably upheld a ban on solicitation even where the solicitor was not accepting monies but instead, for example, was providing envelopes whereby individuals might send in their contributions, since both the advocacy and the solicitation might lead to congestion, fraud or both, even when not coupled with receipt of funds.²⁴³ However, one infers from Justice Kennedy's concurrence that he did not believe that a solicitation ban would pass constitutional muster if the solicitations were not coupled with the immediate receipt of funds.²⁴⁴

238. *Id.* at 708.

239. *Id.*

240. *Id.* at 708-09.

241. *See id.* at 705 (discussing why it is permissible to prohibit in-person solicitation when that solicitation is coupled with immediate receipt of funds).

242. Justices Blackmun, Souter, and Stevens joined only Part I of Justice Kennedy's opinion. *See id.* at 693.

243. Chief Justice Rehnquist and Justices White, Scalia and Thomas all would have upheld the leafleting ban. *See Lee*, 505 U.S. 830, 831 (1992). They presumably believed that solicitation, even without receipt of money, was permissible to prohibit, because of potential congestion difficulties. Justice O'Connor in her concurrence would presumably uphold a broader solicitation ban than would Justice Kennedy, since both congestion and fraud would still be worries. *See ISKCON*, 505 U.S. 690 (O'Connor, J., concurring).

244. *See id.* at 709 (Kennedy, J., concurring) ("the Port Authority has not prohibited all solicitation, but only a narrow class of conduct associated with a particular manner of solicitation") and *id.* at 708 ("Attempting to collect money at another time or place is a far less plausible option in the context of a sale than when soliciting donations . . .").

Thus, when he says that he is concurring in the judgment, he presumably means that he agrees that solicitation when coupled with immediate receipt of funds is subject to regulation, although it seems likely that many reading the opinion would read the judgment more broadly.²⁴⁵

There is some difficulty in interpreting the proselytizing jurisprudence in light of *Heffron*, *ISKCON*, and *Lee*. It might be argued that the Court is simply unsympathetic to the protection of a minority religion,²⁴⁶ but the Court is upholding the Krishnas' right to proselytize including the right to distribute written literature in airports.²⁴⁷ The Court has likened solicitation to speech, but is clearly distinguishing them in the *ISKCON* cases, since the Court is upholding the right to disseminate religious views, while upholding state limitations or prohibitions on solicitation. The Court alludes to worries about fraud, but bases its decisions on worries about traffic congestion. Yet, the traffic flow problem which the Court allegedly finds so worrisome might arise as readily from what the Constitution allegedly protects as from what the Court held was appropriately subject to regulation. In short, the *ISKCON* cases raise a variety of questions but offer few coherent answers about what the Constitution protects.

CONCLUSION

Claims to the contrary notwithstanding, the Court's jurisprudence with respect to private proselytizing is far from clear. It may well be that part of that lack of clarity involves the Court's own ambivalence about how to treat religious fundraising, especially when part of a ritual. Thus, the *Murdock* Court treated solicitation as akin to preaching and worthy of robust protection, while the *Heffron* Court suggested that solicitation on

245. For example, when the opinion is cited in the literature, it is often cited as upholding the regulation of solicitation rather than as only upholding the regulation of solicitation when coupled with the immediate receipt of funds. See, e.g., Matthew D. McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929, 943 (2000) ("The Court held that the airport was a non-public forum and the ban on solicitation of contributions was a reasonable and viewpoint-neutral exercise of government authority."); R. Alexander Acosta, *Revealing the Inadequacy of the Public Forum Doctrine: International Society for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992), 16 HARV. J.L. & PUB. POL'Y 269, 269 (1993) ("Holding that airports were non-public fora, the Supreme Court, in *International Society for Krishna Consciousness, Inc. v. Lee*, ('ISKCON'), employed public forum analysis to disallow a prohibition on leafletting but uphold a ban on solicitation in the major airports of the New York City metropolitan area.").

246. But see *Goldman v. Weinberger*, 475 U.S. 503, 524 (1986) (Brennan, J., dissenting) ("A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar.").

247. Cf. W. Burlette Carter, Book Review, *Can This Culture Be Saved? Another Affirmative Action Baby Reflects on Religious Freedom*, 95 COLUM. L. REV. 473, 488 n.47 (1995) (reviewing STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993)) ("For example, in telling readers that the Court banned solicitation of money by the adherents in *Krishna Consciousness*, Carter does not mention that, in a companion case, the Court sustained plaintiffs' challenge to a related ban on distributing literature (as opposed to soliciting money) inside the same airport. Whether or not the linedrawing makes sense, the fact is that the Court sided with religious plaintiffs.").

behalf of religions, even when a part of established ritual, was not entitled to greater constitutional protection than was solicitation on behalf of other organizations, whether religious or non-religious. The *ISKCON* Court was willing to uphold a ban on solicitation, notwithstanding that the Port Authority had already demonstrated that solicitation could be limited in a way that would accommodate the needs of airport passengers.

Throughout the *ISKCON* cases, members of the Court hint that their concern is to prevent fraud. If that was the worry and there was sufficient evidence of fraud,²⁴⁸ then there was no reason for the Court to contradict the existing jurisprudence. *Cantwell* had already established that states could impose restrictions on solicitation for religious purposes to protect against fraud. The *Heffron* and *ISKCON* Courts go farther than *Cantwell*, however, suggesting that religious solicitation can be prohibited even when less restrictive regulations provide adequate safeguards against fraud. Then, *Stratton* suggests that even the interest in preventing fraud may not suffice when the regulation of religious solicitation is at issue.²⁴⁹ Thus, the Court is sending very mixed messages with respect to the steps that can permissibly be taken to prevent fraud by those soliciting on behalf of a religion and to the kinds of evidence of past fraud that must exist to justify the state's taking prophylactic measures to prevent future fraud.

Members of the Court have recognized that solicitation limitations can impose a severe burden on religious organizations, but have been ambivalent about whether the possible increased burden on religious groups has constitutional weight. Members also seem ambivalent about whether religious speech, especially when in the context of religious ritual, is entitled to special protection or instead should only be treated in the same way that protected speech is treated more generally.

At least part of the difficulty in interpreting the proselytizing cases is that most of the opinions are compatible with the Court's not giving religious speech and solicitation special consideration. *Murdock* is an exception, suggesting that religious speech deserves extra protection, although the *ISKCON* cases, especially *Heffron*, seem to stand for the proposition that religious organizations are not to be given special solicitude constitutionally. To add to the interpretive difficulties, the *ISKCON* cases seem inexplicable both internally and in light of the background jurisprudence. For example, one would have thought that it would be permissible to prohibit all literature distribution in airports if reasonableness were the relevant standard. If the distribution of free literature

248. But see *supra* note 204 and accompanying text (quoting Justice Souter's *ISKCON* dissent in which he notes the very scant evidence of fraud).

249. See *Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168 (2002).

could not be prohibited in airports, then it is not clear why a very severe limitation of free literature distribution is permissible at a state fair.

Nor can it be claimed that the proselytizing jurisprudence is best explained by noting that many of the cases offering robust protection were decided in the 1930s or 1940s, since *Stratton* was decided in 2002. Further, to make matters more confusing, none of the Justices deciding *Stratton* even mentioned the ISKCON cases, not even Chief Justice Rehnquist in his dissent.²⁵⁰ However, the majority opinion does refer to *Cantwell*,²⁵¹ *Martin*,²⁵² *Murdock*,²⁵³ *Follett*,²⁵⁴ and *Lovell*,²⁵⁵ all cases decided in the 1930s and 1940s.²⁵⁶ It is almost as if the Court believes that the ISKCON cases do not involve proselytizing.

The Supreme Court has suggested that proselytizing, whether or not coupled with solicitation of funds, is accorded robust protection by the Constitution. Yet, the Court has upheld restrictions on proselytizing based on speculation about traffic flow or unsubstantiated allegations of fraud. It may be that members of the Court are distinguishing between speech and solicitation *sub silentio*, but even that does not explain the decisions entirely. The *Heffron* Court upheld and the *Lee* Court struck a limitation on the distribution of written literature, where traffic flow considerations were paramount in both cases, and the potential harms caused by the congestion, e.g., missing a plane versus waiting a little longer before one could enjoy a ride, militated in favor of greater deference in the airport context.

The Court's proselytizing jurisprudence may simply be a function of the Court's confused and confusing approach to the Religion Clauses more generally.²⁵⁷ Nonetheless, it might at least be hoped that the Court would try to clarify the existing jurisprudence rather than simply pretend that certain cases were never decided or offer justifications that simply are not credible. That does not seem too much to ask, although in an area as contentious as the Religion Clauses,²⁵⁸ it seems unlikely in the

250. The majority opinion written by Justice Stevens begins at *id.* at 153; Justice Breyer's concurrence begins at *id.* at 169; Justice Scalia's concurrence in the judgment begins at *id.* at 171; and Chief Justice Rehnquist's dissent begins at *id.* at 172.

251. *Id.* at 160, 162.

252. *Id.* at 160, 163.

253. *Id.* at 160-62.

254. *Id.* at 160.

255. *Id.*

256. *Lovell* was decided in 1938, *Cantwell* in 1940, *Martin* and *Murdock* in 1943, and *Follett* in 1944. See *id.* at 160-61.

257. See *Van Orden v. Perry*, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) ("[T]he incoherence of the Court's decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application. All told, this Court's jurisprudence leaves courts, governments, and believers and nonbelievers alike confused—an observation that is hardly new.").

258. For example, those who would preclude a display of the Ten Commandments on constitutional grounds are sometimes accused of being hostile to religion. See *McCreary County v. ACLU*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting) ("Today's opinion . . . modifies *Lemon* to ratchet up the Court's hostility to religion."); *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring) ("At the

near term that the Court will be able to offer an approach on which the members can even agree, much less one which can plausibly account for the jurisprudence and offer guidance to lower courts.

same time, to reach a contrary conclusion here, based primarily upon on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions.").

